DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 54

[REG–128309–03]

RIN 1545–BC26

Section 411(d)(6) Protected Benefits

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations providing guidance on the conditions under which a plan amendment may eliminate or reduce an early retirement benefit, a retirement-type subsidy, or an optional form of benefit (section 411(d)(6)(B) protected benefits) with respect to a participant's benefits attributable to service before the amendment. The proposed regulations would also provide guidance concerning how the notice requirements of section 4980F apply with respect to such plan amendments. These proposed regulations would generally affect plan sponsors of, and participants in, qualified retirement plans.

DATES: Written or electronic comments must be received by June 22, 2004.

Requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for June 24, 2004, at 10 a.m. must be received by June 3, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–128309–03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–128309–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically to the IRS Internet site at *http://www.irs.gov/regs.* The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Pamela R. Kinard at (202) 622–6060; concerning submissions of comments, the hearing, and the requests to be placed on the building access list to attend the hearing, contact Guy Traynor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR parts 1 and 54 under sections 411(d)(6) and 4980F of the Internal Revenue Code (Code) and section 204(g) and (h) of the Employee Retirement Income Security Act of 1974 (ERISA). These proposed regulations, when finalized, would revise Treasury regulations § 1.411(d)–3 to reflect changes to section 411(d)(6) made by the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 38) (EGTRRA). These proposed regulations would also include rules relating to changes to section 411(d)(6) made by the Retirement Equity Act of 1984, Public Law 98–397 (98 Stat. 1426) (REA). In addition, these proposed regulations would amend § 54.4980F–1(b), Q&A–8, relating to the notice requirement for certain plan amendments that reduce early retirement benefits or retirement-type subsidies.

Section 411(d)(6)(A) provides that a plan is treated as not satisfying the requirements of section 411 if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8) of the Code or section 4281 of ERISA. Section 411(a)(7) generally defines the term ''accrued benefit'' as meaning, for a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in section 411(c)(3), expressed in the form of an annual benefit commencing at normal retirement age. Under section 411(c)(3), if an employee's accrued benefit under a defined benefit plan is to be determined as an amount other than an annual benefit commencing at normal retirement age, the employee's accrued benefit is the actuarial equivalent of such benefit.

Section 301(a) of REA amended section 411(d)(6) to add subparagraph (B), which provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy, or eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment is treated as impermissibly reducing accrued benefits. For a retirement-type subsidy, this protection applies only with respect to an employee who satisfies the preamendment conditions for the subsidy (either before or after the amendment). Section 411(d)(6)(B) also authorizes the Secretary to provide, through regulations, that section 411(d)(6)(B) does not apply to any plan amendment that eliminates optional forms of benefit (other than a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy).

On July 11, 1988, final regulations (TD 8212) under section 411(d)(6) were published in the **Federal Register** (53 FR 26050). Section 1.411(d)–4, Q&A–1(a), of the Regulations provides that section 411(d)(6) protects certain benefits, to the extent they have accrued, so that such benefits cannot be reduced or eliminated by plan amendment, except to the extent permitted by regulations. Section 1.411(d)–4 provides rules for when a plan may be amended to reduce or eliminate a section 411(d)(6) protected benefit.

Section 4980F of the Code and section 204(h) of ERISA each require that a plan administrator must give notice of a plan amendment to affected plan participants and beneficiaries when the plan amendment provides for a significant reduction in the rate of future benefit accrual or the elimination or significant reduction in an early retirement benefit or a retirement-type subsidy.

Section 645(b)(1) of EGTRRA amended section 411(d)(6)(B) of the Code to direct the Secretary to issue regulations providing that section 411(d)(6)(B) does not apply to any amendment that reduces or eliminates early retirement benefits or retirement-type subsidies that create significant burdens or complexities for the plan and plan participants unless such amendment adversely affects the rights of any participant in a more than *de minimis* manner. Section 645(b)(2) of EGTRRA also amended section 204(g)(2) of ERISA to include a similar directive for purposes of section 204(g) of ERISA, which provides a rule parallel to section 411(d)(6) of the Code.

Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Further, section 204(g) of ERISA authorizes the Secretary of the Treasury to issue the regulations under section 204(g) of ERISA, relating to the permissible elimination of optional forms of benefit. Thus, these proposed Treasury regulations issued under sections 411(d)(6) and 4980F of the Code apply as well for purposes of section 204(g) and (h) of ERISA, and respond to the EGTRRA directive for purposes of both section 411(d)(6) of the Code and section 204(g) of ERISA.

In Notice 2002–46 (2002–2 C.B. 96), Treasury and the IRS requested comments regarding the possible approaches for eliminating optional forms of benefit from defined benefit plans, including comments on whether the retention of certain optional forms of benefit under a defined benefit plan results in significant burdens or complexities for plan sponsors and participants, and the conditions under which these optional forms of benefit are of *de minimis* value to plan participants. In Notice 2003–10 (2003–5 I.R.B. 369), Treasury and the IRS announced that regulations would be proposed to provide general guidance relating to early retirement benefits and retirement-type subsidies under section 411(d)(6)(B). Comments were requested on the guidance that should be provided with respect to early retirement benefits and retirement-type subsidies, as well as whether the proposed regulations should permit plan amendments that eliminate or reduce early retirement benefits or retirement-type subsidies that are contingent on unpredictable events. A number of helpful comments were received in response to these notices and those comments were considered in drafting these proposed regulations.

Explanation of Provisions

General Overview

The proposed regulations would implement the provisions of section 645(b)(1) of EGTRRA by permitting the elimination of early retirement benefits, retirement-type subsidies, and optional forms of benefit under a plan which create significant burdens or complexities for the plan and its participants, but only if the elimination does not adversely affect the rights of any participant in a more than *de minimis* manner. These rules relating to the permissible elimination of section 411(d)(6)(B) protected benefits are in addition to the rules permitting elimination of section 411(d)(6) protected benefits under § 1.411(d)–4. These proposed regulations would also include general guidance on section 411(d)(6), including the meaning of terms used therein, the scope of the section 411(d)(6)(A) protection against plan amendments decreasing a participant's accrued benefit, and the scope of the section 411(d)(6)(B) protection for early retirement benefits, retirement-type subsidies, and optional forms of benefit.

Scope of Section 411(d)(6) Protections

The proposed regulations would revise the existing final regulations at § 1.411(d)–3. The rules under those regulations would generally be retained but would be updated to reflect statutory changes such as the elimination of class-year vesting and the enactment of section 411(d)(6)(B).

The proposed regulations also would take into account and respond to judicial decisions interpreting section 411(d)(6) (or its parallel provision at section 204(g) of ERISA).[1] For example, the proposed regulations would provide that section 411(d)(6) protection applies to a participant's entire accrued benefit without regard to whether any portion of that accrued benefit is accrued before a participant's severance from employment or is included in the accrued benefit of the participant pursuant to a plan amendment adopted after the participant's severance from employment.[2]

The proposed regulations would retain the rules in the existing regulations that provide that, for purposes of determining whether or not any participant's accrued benefit is decreased, all plan amendments affecting, directly or indirectly, the computation of accrued benefits are taken into account, and that, in determining whether a reduction has occurred, all amendments with the same applicable amendment date (the later of the adoption date or the effective date) are treated as one plan amendment, and would provide that these rules apply to section 411(d)(6)(B) protected benefits as well. Thus, for example, if there are two amendments with the same applicable amendment date, and one amendment increases accrued benefits and the other amendment decreases the early retirement factors that are used to determine the early retirement annuity, the amendments are treated as one amendment and only violate section 411(d)(6) if the net dollar amount of the early retirement annuity after the two amendments is lower at any point in time than it would have been without the two amendments.[3]

The proposed regulations would also provide that a plan amendment violates the requirements of section 411(d)(6) if it is one of a series of plan amendments made at different times that, when taken together, have the effect of reducing or eliminating a section 411(d)(6) protected benefit in a manner that would otherwise be prohibited if accomplished through a single amendment. The

[1] *See Bellas* v. *CBS, Inc.,* 221 F. 3d 517 (3rd Cir. 2000), *cert. denied,* 531 U.S. 1104 (2001) (involuntary separation benefit is both an early retirement benefit and a retirement-type subsidy to the extent it provides for the payment of normal retirement benefits that continue beyond normal retirement age), *Board of Trustees of the Sheet Metal Workers' National Pension Fund* v. *C.I.R.,* 318 F. 3d 599 (4th Cir. 2003) (a COLA benefit granted by a plan amendment is not an accrued benefit for participants that retired before the effective date of the amendment and, thus, the subsequent plan amendment eliminating the COLA benefit did not violate the anti-cutback rule of section 411(d)(6)), *Michael* v. *Riverside Cement,* 266 F. 3d 1023 (9th Cir. 2001) (a plan amendment providing for an actuarial offset of early retirement benefits previously received by a rehire upon subsequent retirement violates ERISA section 204(g), even though the net effect of the amendment is an increase in the early retirement benefit of the participant), and *Heinz* v. *Central Laborers' Pension Fund,* 303 F. 3d 802 (7th Cir. 2002)), *cert. granted,* 72 U.S.L.W. 3370 (U.S. Dec. 1, 2003) (a pension plan offering fully subsidized early retirement benefits violated section 204(g) of ERISA when the plan was amended to expand the definition of disqualifying employment for purposes of applying its suspension of benefits rule).

[2] This is contrary to the analysis in *Board of Trustees of the Sheet Metal Workers' National Pension Fund* v. *C.I.R.*

[3] This is contrary to the analysis in *Michael* v. *Riverside Cement.*

proposed regulations, however, do not address the interaction of the vesting rules in section 411(a) with section 411(d)(6). This topic, which is currently before the Supreme Court in *Central Laborers' Pension Fund* v. *Heinz,* No. 02–891, is instead reserved for future guidance.

The proposed regulations also provide a number of clarifications regarding section 411(d)(6)(B) protected benefits. The proposed regulations would clarify that, if a plan amendment merely replaces an optional form of benefit with another optional form of benefit that is of inherently equal or greater value, the amendment is not to be treated as eliminating an optional form of benefit, or eliminating or reducing an early retirement benefit or retirement-type subsidy. For example, a change in the method of calculating a joint and survivor annuity from using a 90% adjustment factor on account of the survivorship payment at particular ages on the annuity starting date to using a 91% adjustment factor at the same ages on the annuity starting date is not treated as an elimination of an optional form of benefit.

The proposed regulations would reflect the rules in the existing regulation § 1.411(d)–4, Q&A–1(d), that ancillary benefits, other rights or features, and any other benefits not described in section 411(d)(6) are not benefits protected under section 411(d)(6). The definitions of optional form of benefit, ancillary benefit, and other right or feature have been drawn from the definitions in § 1.401(a)(4)–4. In addition the proposed regulations would provide a definition of early retirement benefit, retirement-type benefit, and retirement-type subsidy. *See* the discussion in this preamble under the heading *Retirement-Type Subsidies and Contingent-Event Benefits.*

Permitted Elimination of Benefits That Are Burdensome or Complex and of De Minimis Value to Participants

Section 411(d)(6)(B) of the Code, as amended by EGTRRA, directs the Secretary to issue regulations providing that section 411(d)(6)(B) does not apply to any amendment that reduces or eliminates benefits or subsidies that create significant burdens or complexities for the plan and plan participants unless such amendment adversely affects the rights of any participant in a more than *de minimis* manner.

The EGTRRA Conference Report provides that it is intended that the factors to be considered in determining whether a plan amendment has more than a *de minimis* adverse effect on any participant will include: (1) All of the participant's early retirement benefits, retirement-type subsidies, and optional forms of benefit that are reduced or eliminated by the amendment; (2) the extent to which early retirement benefits, retirement-type subsidies, and optional forms of benefit in effect with respect to a participant after the amendment's effective date provide rights that are comparable to the rights that are reduced or eliminated by the plan amendment; (3) the number of years before the participant attains normal retirement age under the plan (or early retirement age, as applicable); (4) the size of the participant's benefit that is affected by the plan amendment, in relation to the amount of the participant's compensation; and (5) the number of years before the plan amendment is effective. H.R. Conf. Rep. 107–84, at 254 (2001).

The proposed regulations would generally permit an employer to eliminate a section 411(d)(6)(B) protected benefit if the eliminated optional form of benefit is redundant with respect to a retained optional form of benefit. Additional rules would apply to an amendment that, in addition to eliminating an optional form of benefit, also eliminates an early retirement benefit or a retirement-type subsidy. Alternatively, an employer would be permitted to eliminate a section 411(d)(6)(B) protected benefit if the plan amendment was not effective for benefits that begin in the next four years and certain core options are made available to plan participants.

The concepts of allowing an employer to eliminate a redundant optional form of benefit and allowing an employer to eliminate all optional forms of benefit that fall outside a list of core optional forms of benefit were included in suggestions made by commentators who suggested that the elimination of an optional form of benefit would not adversely affect the right of a plan participant in more than a *de minimis* manner as long as the plan offers other optional forms of benefit that are sufficiently similar to the eliminated optional form of benefit. These concepts also reflect factors identified in the legislative history (*e.g.,* the extent to which section 411(d)(6)(B) protected benefits that are available to a participant after the amendment's effective date provide rights that are comparable to the rights of section 411(d)(6)(B) protected benefits that are reduced or eliminated by the plan amendment).

The Treasury and IRS also received comments from practitioners suggesting that the proposed regulations provide a utilization test, which would permit the elimination of an optional form of benefit if the employer can show that the benefit has been utilized rarely by plan participants. These commentators suggested that the lack of utilization is compelling evidence that the elimination of the optional form of benefit would not adversely affect the rights of any plan participant in more than a *de minimis* manner. The Treasury and IRS did not include a utilization test in the proposed regulations because of, among other reasons, the difficulty in applying a utilization standard in situations where there are few retirements (*e.g.,* a small plan).

Under the proposed regulations, the determination of whether the optional forms of benefit that remain after an amendment are sufficiently similar to an eliminated optional form of benefit such that its elimination would not adversely affect the rights of any plan participant in more than a *de minimis* manner depends on a number of factors. These factors include the extent to which the remaining optional forms of benefit provide the same essential characteristics as the eliminated optional form of benefit; whether the remaining optional forms of benefit are available on the same date and are actuarially equivalent to the eliminated optional form of benefit; and the period of time before the eliminated optional form of benefit could have commenced.

The rules in the proposed regulations would require any amendment eliminating an optional form of benefit to have a delayed effective date. This requirement reflects some of the relevant factors listed in the legislative history (*i.e.*, the number of years until the participant reaches retirement age and the number of years until the amendment is effective). A participant's expectations as to which optional forms of benefit will be available are more settled for a participant who is closer to commencing benefits. Therefore, whether any remaining optional form of benefit is sufficiently similar to an eliminated optional form of benefit so that the substitution of one for the other does not adversely affect the right of a plan participant in more than a *de minimis* manner depends in part on how far in the future the participant is expecting to commence benefits.

The Treasury and IRS believe that the proposed regulations would assist plans that have accumulated numerous optional forms of benefits by simplifying plan administration and reducing plan complexity for participants. At the same time, the

proposed regulations would continue to protect the rights of plan participants by not permitting plan amendments that eliminate or reduce an early retirement benefit or a retirement-type subsidy by more than a *de minimis* amount and by protecting the right to elect an optional form of benefit that is most advantageous for a participant with substandard mortality (through inclusion of that form of benefit as a required core option). The rule regarding multiple amendments, discussed above, would preclude the adoption of a series of amendments that, when taken together, constitute an impermissible elimination of a section 411(d)(6)(B) protected benefit. This rule would apply, for example, if a series of amendments were adopted that eliminated a benefit of more than *de minimis* value when considered together, even though each amendment by itself eliminated a benefit of *de minimis* value.

Elimination of Redundant Optional Forms of Benefit

The proposed regulations would provide that a plan may be amended to eliminate an optional form of benefit for a participant with respect to benefits attributable to service before the applicable amendment date if the optional form of benefit is redundant with respect to a retained optional form of benefit and certain other conditions are satisfied. An optional form of benefit is considered redundant with respect to a retained optional form of benefit if the retained optional form of benefit is in the same family of optional forms of benefit as the optional form of benefit being eliminated and the participant's rights with respect to the retained optional form of benefit are not subject to materially greater restrictions than applied to the optional form of benefit being eliminated.

Under the proposed regulations, a plan would be permitted to be amended to eliminate a redundant optional form of benefit for a participant (with respect to benefits attributable to service before the applicable amendment date) only if the plan amendment does not apply to an optional form of benefit with an annuity starting date that is earlier than 90 days after the date the amendment is adopted. In addition, in cases in which the retained optional form of benefit for the participant does not commence on the same annuity starting date as the optional form of benefit that is being eliminated, or, as of the applicable amendment date, the actuarial present value of the retained optional form of benefit is less than the actuarial present value of the optional form of benefit being eliminated, the plan amendment would have to satisfy additional conditions described below.

The proposed regulations would describe 6 basic families of optional forms of benefit—the 50% or more joint and contingent family, the below 50% joint and contingent family, the 10 years or less term certain and life annuity family, the greater than 10 years term certain and life annuity family, the 10 years or less level installment family, and the greater than 10 years level installment family. For this purpose, the determination of whether two optional forms of benefit are in one of the 6 basic families is made without regard to certain differences among enumerated additional features, such as the actuarial factors used to determine the amount of benefits under the optional form of benefit, a social security leveling feature, a refund of employee contributions feature, or a retroactive annuity starting date feature.

Under the proposed regulations, not every optional form of benefit will fit within one of the 6 families listed above. For example, a single-sum distribution option will not be in one of the 6 families listed above and, therefore, the right to receive a single-sum distribution cannot be eliminated under the redundancy rule. However, if there are two optional forms of benefit that do not fit within a family listed above and the only differences between those optional forms of benefit are differences that would be disregarded in determining whether two optional forms of benefits are within the same family (*e.g.*, a single-sum distribution option with and without a retroactive annuity starting date feature), the two optional forms of benefit are treated as members of a separate family.

The proposed regulations would provide that the ability to eliminate redundant optional forms of benefits generally would not apply to optional forms of benefit that are core options (as described below). However, an optional form of benefit that is a core option could be eliminated in favor of a similar retained core option (where the only differences between the eliminated optional form of benefit and the retained optional form of benefit are differences that would be disregarded in determining whether the two optional forms of benefits are within the same family).

The proposed regulations would also provide that, to the extent an optional form of benefit that is being eliminated includes either a social security leveling feature or a refund of employee contributions feature, the retained optional form of benefit must also include that feature, and, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature or a refund of employee contributions feature, the retained optional form of benefit must not include that feature. Thus, a plan cannot eliminate an optional form of benefit that includes a refund of employee contributions feature in favor of an optional form of benefit that does not include that feature. Similarly, a plan cannot eliminate an optional form of benefit that includes a social security leveling feature in favor of an optional form of benefit that does not include that feature. However, the plan need not retain social security leveling features that provide for assumed commencement of social security benefits at more than one date.

In addition, the proposed regulations provide that, to the extent an optional form of benefit that is being eliminated is payable without a retroactive annuity starting date feature, the retained optional form of benefit must be payable without that feature. Thus, a plan cannot eliminate an optional form of benefit that is payable without a retroactive annuity starting date feature in favor of an optional form of benefit that is payable only with a retroactive annuity starting date. However, the plan can eliminate an optional form of benefit payable with a retroactive annuity starting date feature in favor of an optional form of benefit that is payable without a retroactive annuity starting date.

Permissible Elimination of Noncore Optional Forms of Benefit Where Core Options Are Offered

As an alternative to the redundancy rule, the proposed regulations would allow a plan amendment to eliminate an optional form of benefit for plan participants with respect to benefits attributable to service before the applicable amendment date if: (1) The plan, after the amendment, offers a designated set of core options to plan participants with respect to benefits attributable to service both before and after the amendment; and (2) the amendment does not apply to participants with annuity starting dates less than four years after the date the amendment is adopted.

The core options are defined in the proposed regulations as a straight life annuity, a 75% joint and contingent annuity, a 10-year certain and life annuity, and the most valuable option for a participant with a short life expectancy. The core options were selected to define a minimum set of

optional forms of benefit that provide participants with a sufficiently broad set of choices to meet participants' essential needs in a wide range of personal circumstances. The 75% joint and contingent annuity has been chosen as a required core option based on a recommendation from the 1994–1996 report of the Advisory Council on Social Security.[4] In that report, the Council recommended that dependent spousal benefits in Social Security be gradually increased to 75% of the combined benefit that the surviving spouse and decedent spouse were receiving when both of the spouses were alive. This recommendation was based on statistical studies concluding that a retired surviving spouse generally needs to receive at least 75% of the amount that the retired couple was receiving in order for the surviving spouse to maintain his or her standard of living.

The Treasury and IRS received comments emphasizing the importance of ensuring that a core set of options include some forms of distribution that would be particularly valuable to a participant whose life expectancy differs from the life expectancy used by the plan for actuarial adjustments. This includes providing an option of a life annuity (valuable for a participant with an above-average life expectancy) and the importance of retaining a single-sum payment option (or the form providing the largest death benefit) for a participant with a below-average life expectancy, such as a participant who retires due to a mortal illness.

In light of the comments received, the proposed regulations would include in the list of core options the most valuable option for a participant with a short life expectancy. This is defined as the optional form of benefit that is reasonably expected to result in payments that have the largest actuarial present value in the case of a participant who dies shortly after the annuity starting date. The proposed regulations would provide a safe harbor method for determining which optional form of benefit under the plan is the most valuable option for a participant with a short life expectancy. Under this safe harbor method, a plan may treat a single-sum distribution option with an actuarial present value that is not less than the actuarial present value of any optional form of benefit being eliminated as the most valuable option for a participant with a short life expectancy. If a plan does not offer such a single-sum distribution option, the plan may treat a joint and contingent annuity with a continuation percentage of at least as great as the highest continuation percentage available before the amendment as the most valuable option for a participant with a short life expectancy, provided that the continuation percentage is at least 75%. In the event a plan has neither a single-sum distribution option nor a joint and contingent annuity with a continuation percentage of at least 75%, the plan may treat a term certain and life annuity with a term certain period of at least 15 years as the most valuable option for a participant with a short life expectancy.

In addition, an employer would not be permitted to use the core options alternative to eliminate a single-sum distribution. An exception applies for a single-sum distribution option with respect to less than 25% of the participant's accrued benefit as of the date that the single-sum distribution option is eliminated. This protection against elimination of a single-sum distribution option is in addition to any protection that might be afforded such option as the most valuable option for a participant with a short life expectancy.

The proposed regulations also would provide that, to the extent an optional form of benefit being eliminated includes either a social security leveling feature or a refund of employee contributions feature, at least one of the core options must also be available with that feature. In addition, to the extent that an optional form of benefit being eliminated does not include a social security leveling feature or a refund of employee contributions feature, each of the core options must be available without that feature.

As with the redundancy rule, if the core options do not commence on the same annuity starting date as the optional form of benefit that is being eliminated, or, as of the applicable amendment date, the actuarial present value of the core option is less than the actuarial present value of the optional form of benefit being eliminated, the plan amendment would have to satisfy additional conditions described below.

Elimination of Early Retirement Benefits and Retirement-Type Subsidies

The proposed regulations would set forth additional requirements that a plan amendment must satisfy if the retained optional form of benefit or each core option does not have the same annuity starting date or has a lower actuarial present value than the optional form of benefit that is being eliminated. Such an amendment would be permitted only if the optional form of benefit creates significant burdens and complexities for the plan and plan participants and the elimination does not adversely affect the rights of any participant in more than a *de minimis* manner. If the additional requirements are satisfied, a plan may be amended to eliminate an optional form of benefit without regard to whether the amendment has the effect of eliminating an early retirement benefit or reducing a retirement-type subsidy. These additional requirements would not apply to an amendment that eliminates an optional form of benefit in a manner that is otherwise permissible under these proposed regulations where both the annuity starting date and the actuarial present value of the retained optional form of benefit are the same as those features of the eliminated optional form of benefit.

The determination of whether a plan amendment eliminates or reduces section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants is based on facts and circumstances. In the case of an amendment that eliminates an early retirement benefit, relevant factors include whether the annuity starting dates under the plan considered in the aggregate are burdensome or complex (*e.g.*, the number of categories of early retirement benefits, whether the terms and conditions applicable to the plan's early retirement benefits are difficult to summarize in a manner that is concise and readily understandable to the average plan participant, and whether those different early retirement benefits were added to the plan as a result of plan mergers, acquisitions, or other business transactions), and whether the effect of the plan amendment is to reduce the number of categories of early retirement benefit. Analogous factors apply in the case of a plan amendment eliminating a retirement-type subsidy or changing actuarial factors.

The proposed regulations would provide a rebuttable presumption for plan amendments that eliminate a set of annuity starting dates or actuarial factors where the annuity starting dates or actuarial factors under the plan considered in the aggregate are burdensome or complex. If this is the case, then elimination of any one item of the relevant category (*i.e.*, annuity starting dates or actuarial factors) is presumed to eliminate section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants. However, if the effect of a plan amendment with respect to a set of

[4] *See* the Report of the 1994–1996 Advisory Council on Social Security, available at *http://www.ssa.gov/history/reports/adcouncil/report/findings.htm.*

optional forms of benefit is merely to substitute one set of annuity starting dates for another set of annuity starting dates (or one set of actuarial factors for another set of actuarial factors), without any reduction in the number of different annuity starting dates (or actuarial factors), then the plan amendment would not be permitted under these regulations.

The generally applicable rules regarding multiple amendments apply to a series of plan amendments that first create burdens and complexities and then later eliminate them. In accordance with these rules, for example, section 411(d)(6)(B) protected benefits are not considered to create burdens and complexities for a plan and its participants if the plan adds a retirement-type subsidy in order to later eliminate another retirement-type subsidy, even if the elimination of the other subsidy would not adversely affect the rights of any plan participant in a more than *de minimis* manner as provided in the regulations.

In the case of a plan amendment eliminating an optional form of benefit under the redundancy rule, the proposed regulations would provide that a plan amendment eliminating the optional form of benefit does not adversely affect the rights of any participant in more than a *de minimis* manner if the retained optional form of benefit has substantially the same annuity starting date as the optional form of benefit that is being eliminated and the actuarial present value of the eliminated optional form of benefit does not exceed the actuarial present value of the retained optional form of benefit by more than a *de minimis* amount. In the case of a plan amendment eliminating an optional form of benefit under the core options rule, the proposed regulations would provide the plan amendment does not adversely affect the rights of any participant in more than a *de minimis* manner if each of the core options is available with substantially the same annuity starting date as the optional form of benefit that is being eliminated and the actuarial present value of the eliminated benefit does not exceed the actuarial present value of any core benefit by more than a *de minimis* amount. For these purposes, the proposed regulations would provide that annuity starting dates are considered substantially the same if they are within six months of each other.

The Conference Report to EGTRRA provides that the intent of the provision authorizing regulations is solely to permit the elimination of early retirement benefits, retirement-type subsidies, or optional forms of benefit that have no more than a *de minimis* effect on any participant but create disproportionate burdens and complexities for a plan and its participants, and provides two examples illustrating this intent. H.R. Conf. Rep. 107–84, at 254–55 (2001). These examples involve a situation in which the acquisition of the employer and subsequent merger of plans results in the maintenance of multiple retirement-type subsidies (including early retirement subsidies) that create disproportionate burdens and complexities for the plan and its participants. Under the first example, for a 25-year-old participant with compensation of $40,000, the Conference Report provides that Treasury regulations could permit the participant's retirement-type subsidy under the plan to be eliminated entirely. For this participant, taking into account all relevant factors, including the value of the benefit, the participant's compensation, and the number of years before eligibility for the subsidy, the participant's subsidy, with a present value of $75, is of *de minimis* value. Under the second example, for a 50-year-old participant with compensation of $40,000, the Conference Report provides that Treasury regulations could permit the participant's retirement-type subsidy with a present value of $10,000 to be replaced with another retirement-type subsidy with a present value of $9,850. The Conference Report provides that the regulations could permit replacement in the retirement-type subsidy (which reduces the value of the participant's subsidy by $150) because the difference in subsidies is *de minimis*. However, the $10,000 subsidy could not be entirely eliminated. *Id.*

Based on these examples, the proposed regulations would provide that a reduction in actuarial present value is of no more than a *de minimis* amount (and hence, the rights of any participant are not adversely affected in a more than *de minimis* manner) if the reduction does not exceed the greater of 2% of the present value of the retirement-type subsidy under the eliminated optional form of benefit (if any) prior to the amendment or 1% of the participant's compensation for the prior plan year (as defined in section 415(c)(3)).

In addition to this numerical test, the proposed regulations would provide a *de minimis* test relating to changes in early retirement and other actuarial adjustment factors. Under this rule, the elimination of an optional form of benefit does not adversely affect the rights of any participant in more than a *de minimis* manner if the amendment does not apply to an annuity starting date before the end of the expected transition period for that optional form of benefit. The expected transition period for an optional form of benefit is the period by the end of which it is reasonable to expect, taking into account future accruals, that the section 411(d)(6)(B) protected benefit being eliminated would be subsumed by another optional form of benefit if the plan amendment limited the optional form of benefit being eliminated to the participant's benefits attributable to service before the applicable amendment date. The expected transition period is thus based on the expected wearaway period.

For purposes of this expected transition rule, the expected transition period must be determined in accordance with reasonable actuarial assumptions about the future that are likely to result in the longest reasonable expected transition period, such as the assumption that the participant's compensation will not increase and that future accruals will not exceed accruals in recent periods. If the plan is subsequently amended to reduce the rate of future benefit accrual (or otherwise to lengthen the expected transition period) before the end of the previously determined expected transition period, the subsequent plan amendment must provide that the elimination of the optional form of benefit is void (or must provide for the effective date to be further extended to a new expected transition date taking into account the subsequent amendment). In addition, a plan amendment eliminating an optional form of benefit using the expected transition rule must be limited to participants who continue employment through the end of the expected transition period.

Advance Notice to Participants

Section 4980F(e) of the Code and section 204(h) of ERISA require notice of an amendment to an applicable pension plan that either provides for a significant reduction in the rate of future benefit accrual or that eliminates or significantly reduces an early retirement benefit or a retirement-type subsidy. *See* § 54.4980F–1 generally. While § 54.4980F–1(b), Q&A–7(b) and 8(c), generally provide that an amendment eliminating an optional form of benefit as permitted under these proposed regulations would not be a significant reduction for which advance notice to participants is required, plan sponsors are reminded that an amendment limiting an early retirement

benefit or retirement-type subsidy to service before the applicable amendment date might be a significant reduction in future benefits for which advance notice is required. Accordingly, advance notice may be required for an amendment permitted under these rules.

These regulations include proposed amendments to the section 4980F regulations clarifying that, for purposes of determining whether an amendment reducing a retirement-type subsidy as permitted under the expected transition period rule is a significant reduction for purposes of section 4980F, the amendment is treated in the same manner as an amendment that limits the retirement-type subsidy to benefits that accrue before the applicable amendment date with respect to the participants (and alternate payees) to whom the reduction is reasonably expected to apply. The proposed changes to the section 4980F regulations also include examples illustrating these rules and clarifying that the effective date of the amendment for purposes of section 4980F(e) of the Code and section 204(h) of ERISA is not the same as the effective date of the reduction.

Retirement-Type Subsidies and Contingent-Event Benefits

Since section 411(d)(6)(B) was added to the Code in REA, questions have arisen as to whether a benefit that is contingent on the occurrence of an unpredictable event—such as a plant shutdown—is a retirement-type subsidy and, thus, protected by section 411(d)(6). Some courts have held that an unpredictable contingent-event benefit is protected, while one has held that it is not.[5]

Notice 2003–10 requested comments on anticipated guidance regarding early retirement benefits and retirement-type subsidies under section 411(d)(6)(B). Notice 2003–10 also stated that regulations addressing subsidies provided upon a plant shutdown would be prospective and that relief from disqualification would be provided.

After reviewing the legislative history, the analysis in the relevant cases, and the submissions of the commentators, Treasury and the IRS have concluded that, if a contingent-event benefit is a retirement-type subsidy, the benefit cannot be reduced or eliminated with respect to service prior to the applicable amendment date without violating section 411(d)(6)(B). The proposed regulations would apply this result without regard to whether the contingent event that triggers the payment of the benefit has or has not occurred prior to the amendment. Thus, the proposed regulations would require the protection of contingent-event benefits that provide retirement-type subsidies under section 411(d)(6)(B) even before the occurrence of the contingency.

The rules under the proposed regulations for determining whether a contingent-event benefit provides a retirement-type subsidy that is protected under section 411(d)(6) or an ancillary benefit that is not protected would be based on the legislative history of REA. The legislative history provides that:

> [T]he term ''retirement-type subsidy'' is to be defined by Treasury regulations. The committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy. The committee expects that Treasury regulations will prevent the recharacterization of retirement-type benefits as benefits that are not protected [under section 411(d)(6)].[6]

The proposed regulations would provide that ancillary benefits are the benefits listed in the legislative history and other similar benefits that do not affect the payment of the accrued benefit. Thus, if the contingent-event benefit is a plant-shutdown benefit that does not continue beyond retirement age, then the proposed regulations would include the benefit in the definition of ancillary benefits and the contingent-event benefit could be reduced or eliminated without violating section 411(d)(6).

By contrast, the proposed regulations would provide that the payment of an accrued benefit in an optional form or the payment of any other benefit that continues after retirement is a retirement-type benefit (provided that it is not in the list of ancillary benefits set forth in the regulations). Thus, the proposed regulations would provide that if the contingent-event benefit continues beyond retirement (and is not in the list of ancillary benefits set forth in the regulations), the contingent-event benefit would be a retirement-type benefit. To the extent that the retirement-type benefit has a present value in excess of the present value of the accrued benefit, the contingent-event benefit provides a retirement-type subsidy that is protected under section 411(d)(6)(B).

Further, in accordance with the legislative history to REA, the regulations would specifically prohibit an amendment that recharacterizes a retirement-type benefit as an ancillary benefit. Thus, for example, a plan cannot be amended to recharacterize any portion of an early retirement subsidy as a social security supplement that is an ancillary benefit. *See also* § 1.411(d)–4, Q&A–2(c), for rules relating to serial amendments.

Proposed Effective Date

These regulations are proposed to be applicable to amendments adopted on or after the date of the publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. These proposed regulations cannot be relied upon until they are adopted in final form. When these regulations are finalized, the IRS, under its general authority in section 7805(b), will not treat a plan as failing to satisfy the requirements of sections 401 and 411 merely because of a plan amendment that eliminates or reduces an early retirement benefit or retirement-type subsidy that is conditioned on the occurrence of an unpredictable contingent event (within the meaning of section 412(l)) if the amendment is adopted and effective prior to the occurrence of the contingent event and prior to the finalization of these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. This notice of proposed rulemaking does not impose a collection of information on small entities, thus the Regulatory Flexibility

[5] Compare *Bellas* v. *CBS, Inc., supra,* at fn. 1; *Richardson* v. *Pension Plan of Bethlehem Steel Corp.,* 67 F. 3d 1462 (9th Cir. 1995), *withdrawn,* 91 F. 3d 1312 (9th Cir. 1996), *modified,* 112 F.3d 982 (9th Cir. 1997) (shutdown benefit is a retirement-type subsidy protected under anticutback rule, opinion withdrawn and modified because court later found plan amendment not valid); *Harms* v. *Cavenham Forest Industries, Inc.,* 984 F. 2d 686 (5th Cir.), *cert. denied,* 510 U.S. 944 (1993) (involuntary separation benefit is a retirement-type benefit protected under the anticutback rule); and *Arena* v. *ABB Power T&D Company, Inc.,* 2003 U.S. Dist. LEXIS 13166, 31 Employee Benefit Cas. (BNA) 1473 (S.D. Ind. July 22, 2003) (plant shutdown benefit is a retirement-type subsidy protected by the anticutback rule because the benefit continues beyond normal retirement age and the amount of the benefit exceeds the actuarially reduced normal retirement benefit); with *Ross* v. *Pension Plan for Hourly Employees of SKF Industries, Inc.,* 847 F. 2d 329 (6th Cir. 1988) (plant shutdown benefit is not a retirement-type subsidy).

[6] S. Rep. No. 98–575, at 26 (1984).

Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury and IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

Comments are also requested on the following issues:

- Whether there should be additional families of optional forms of benefit besides the six families listed in the redundancy rule at § 1.411(d)–3(c)(4);
- Whether the core options, including the specification of the most valuable option for a participant with a short life expectancy, are sufficient to protect the value of benefit distribution options in a broad range of personal circumstances, such as for a participant with substandard mortality;
- Whether the rules in § 1.411(d)–3(e) permitting the reduction of present value through changes in actuarial factors are administrable and sufficiently protective of participants' interests;
- Whether the expected transition period rule should be permitted to apply to a participant who severs employment during the expected transition period (and who satisfies the pre-amendment conditions for the optional form of benefit) if the optional form of benefit being eliminated (or a comparable optional form of benefit with at least the same present value) is available before the end of the expected transition period and the former employee receives written notice describing the effect of the amendment before the amendment becomes applicable.
- How to determine whether a benefit, including a contingent-event benefit, continues after retirement (or retirement age);
- The extent to which plant-shutdown benefits that do not continue after retirement age are permitted to be provided in a qualified plan (*e.g.*, whether such benefits are limited to payments payable before the plan's earliest retirement age or are the benefits limited to amounts that are less than the expected social security benefit or, alternatively, the normal retirement benefit); and
- What other benefits (*e.g.*, involuntary termination benefits) that do not continue after retirement age and which are similar to the benefits listed as ancillary in the legislative history should be considered ancillary and should be permitted to be provided in a qualified plan.

A public hearing has been scheduled for June 24, 2004, beginning at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the main entrance, located at 1111 Constitution Avenue, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, *see* the **FOR FURTHER INFORMATION CONTACT** portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written or electronic comments and an outline of the topics to be discussed and time to be devoted to each topic (signed original and eight (8) copies) by June 3, 2004. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving comments has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Pamela R. Kinard, Office of Division Counsel/ Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 54 are proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.411(d)–3 also issued under 26 U.S.C. 411(d)(6) and section 645(b) of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16 (115 Stat. 38).* * *

Par. 2. Section 1.411(d)–3 is revised to read as follows:

§ 1.411(d)–3 Section 411(d)(6) protected benefits.

(a) *Protection of accrued benefits*—(1) *General rule.* Under section 411(d)(6)(A), a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan amendment decreases the accrued benefit of any plan participant, except as provided in section 412(c)(8), section 4281 of the Employee Retirement Income Security Act of 1974 as amended (ERISA), or other applicable law (*e.g.*, section 1541(a)(2) of the Taxpayer Relief Act of 1997 (Pub. L. 105–34, 111 Stat. 788, 1085)). For purposes of this section, a plan amendment includes any changes to the terms of a plan and includes a plan termination. The protection of section 411(d)(6) applies to a participant's entire accrued benefit without regard to whether any portion of that accrued benefit is accrued before a participant's severance from employment or is included in the accrued benefit of the participant pursuant to a plan amendment adopted after the participant's severance from employment.

(2) *Plan provisions taken into account*—(i) *Direct and indirect reduction in accrued benefit.* For purposes of determining whether or not any participant's accrued benefit is decreased, amendments to all the provisions of a plan affecting, directly or indirectly, the computation of accrued benefits are taken into account. Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to years of service and compensation.

(ii) *Amendments effective on the same applicable amendment date.* In determining whether a reduction in accrued benefit has occurred, all amendments with the same applicable amendment date are treated as one plan amendment. Thus, if there are two

amendments with the same applicable amendment date, and one amendment, standing alone, increases benefits and the other amendment, standing alone, decreases benefits, the amendments are treated as one amendment and will only violate section 411(d)(6) if the net effect is to decrease the accrued benefit on that date for any participant.

(iii) *Multiple amendments.* A plan amendment violates the requirements of section 411(d)(6) if it is one of a series of plan amendments made at different times that, when taken together, have the effect of reducing or eliminating a section 411(d)(6) protected benefit in a manner that would be prohibited by section 411(d)(6) if accomplished through a single amendment.

(3) *Application of section 411(a) nonforfeitability provisions with respect to section 411(d)(6) protected benefits.* [Reserved].

(4) *Examples.* The following examples illustrate the application of this paragraph (a):

Example 1. (i) *Facts.* Plan A provides an annual benefit of 2% of career average pay times years of service commencing at normal retirement age (age 65). Plan A is amended on November 1, 2004, effective as of January 1, 2005, to provide for an annual benefit of 1.3% of final pay times years of service, with final pay computed as the average of a participant's highest 3 consecutive years of compensation. As of January 1, 2005, Participant M has 16 years of service, his career average pay is $37,500, and the average of his highest 3 consecutive years of compensation is $67,308. Thus, M's accrued benefit as of the effective date of the amendment is increased from $12,000 per year at normal retirement age (2% times $37,500 times 16 years of service) to $14,000 per year at normal retirement age (1.3% times $67,308 times 16 years of service). As of January 1, 2005, Participant N has 6 years of service, his career average pay is $50,000, and the average of his highest 3 consecutive years of compensation is $51,282. Participant N's accrued benefit as of the applicable amendment date is decreased from $6,000 per year at normal retirement age (2% times $50,000 times 6 years of service) to $4,000 per year at normal retirement age (1.3% times $51,282 times 6 years of service).

(ii) *Conclusion.* The plan amendment fails to satisfy the requirements of section 411(d)(6)(A) because the amendment decreases the accrued benefit of Participant N below the level of the accrued benefit of Participant N immediately before the applicable amendment date.

Example 2. (i) *Facts.* The facts are the same as *Example 1* except that Plan A includes a provision under which Participant N's accrued benefit cannot be less than what it was immediately before the amendment (so that Participant N's accrued benefit could not be less than $6,000 per year at normal retirement age).

(ii) *Conclusion.* The amendment does not violate the requirements of section 411(d)(6)(A) with respect to Participant N (although Participant N would not accrue any benefits until the point in time at which the new formula amount would exceed the amount payable under the minimum provision, approximately 3 years after the amendment becomes effective).

(b) *Protection of section 411(d)(6)(B) protected benefits*—(1) *General rule*—(i) *Prohibition against plan amendments eliminating or reducing section 411(d)(6)(B) protected benefits.* A plan is treated as decreasing an accrued benefit if it is amended to eliminate or reduce a section 411(d)(6)(B) protected benefit as defined in paragraph (f)(4) of this section, except as provided in this section. This paragraph (b)(1) applies to participants who satisfy (either before or after the plan amendment) the pre-amendment conditions for the section 411(d)(6)(B) protected benefit.

(ii) *Contingent benefits.* The rule of paragraph (b)(1)(i) of this section applies to participants who satisfy (either before or after the plan amendment) the pre-amendment conditions for the section 411(d)(6)(B) protected benefit even if the condition on which the eligibility for the section 411(d)(6)(B) protected benefit depends is an unpredictable event (*e.g.,* a plant shutdown).

(iii) *Application of general rules.* For purposes of determining whether or not any participant's section 411(d)(6)(B) protected benefit is eliminated or reduced, the rules of paragraph (a) of this section apply to section 411(d)(6)(B) protected benefits in the same manner as they apply to benefits described in section 411(d)(6)(A). As an example of the application of paragraph (a)(2)(ii) of this section to section 411(d)(6)(B) protected benefits, if there are two amendments with the same applicable amendment date, and one amendment increases accrued benefits and the other amendment decreases the early retirement factors that are used to determine the early retirement annuity, the amendments are treated as one amendment and only violate section 411(d)(6) if the net dollar amount of the early retirement annuity after the two amendments is lower at any point in time than it would have been without the two amendments. As an example of the application of paragraph (a)(2)(iii) of this section to section 411(d)(6)(B) protected benefits, a series of amendments that, when taken together, have the effect of reducing or eliminating early retirement benefits or retirement-type subsidies in a manner that adversely affects the rights of any participant in more than a *de minimis* manner violates section 411(d)(6)(B) even if each amendment would be permissible pursuant to paragraphs (c) through (e) of this section.

(2) *Permissible elimination of section 411(d)(6)(B) protected benefits*—(i) *In general.* A plan may be amended to eliminate a section 411(d)(6)(B) protected benefit if the elimination is in accordance with section 411(d)(6)(C), (D), or (E), paragraph (c) or (d) of this section, or § 1.411(d)–4.

(ii) *Increases in payment amounts do not eliminate an optional form of benefit.* If a plan amendment merely replaces an optional form of benefit with another optional form of benefit that is of inherently equal or greater value (within the meaning of § 1.401(a)(4)–4(d)(4)(i)(A)), the amendment is not to be treated as eliminating an optional form of benefit, or eliminating or reducing an early retirement benefit or retirement-type subsidy. Thus, for example, a change in the method of calculating a joint and survivor annuity from using a 90% adjustment factor on account of the survivorship payment at particular ages on the annuity starting date to using a 91% adjustment factor at the same ages on the annuity starting date is not treated as an elimination of an optional form of benefit.

(3) *Permissible elimination of benefits that are not section 411(d)(6) protected benefits*—(i) *In general.* Section 411(d)(6) does not provide protection for benefits that are ancillary benefits, other rights and features, or any other benefits that are not described in section 411(d)(6). See § 1.411(d)–4, Q&A–1(d). However, a plan may not be amended to recharacterize a retirement-type benefit as an ancillary benefit. Thus, for example, a plan amendment to recharacterize any portion of an early retirement subsidy as a Social Security supplement that is an ancillary benefit violates section 411(d)(6).

(ii) *No protection for future benefit accruals.* Section 411(d)(6) only protects benefits that accrue before the applicable amendment date. Thus, a plan may be amended to eliminate or reduce an early retirement benefit, a retirement-type subsidy, or an optional form of benefit with respect to benefits not yet accrued on the applicable amendment date without violating section 411(d)(6). However, section 4980F(e) of the Internal Revenue Code and section 204(h) of ERISA require notice of an amendment to an applicable pension plan that either provides for a significant reduction in the rate of future benefit accrual or that eliminates or significantly reduces an early retirement benefit or a retirement-type subsidy. *See* § 54.4980F–1 of this chapter generally, and *see* § 54.4980F–

1(b), Q&A–7(b) and Q&A–8(c), with respect to whether such notice is required for a reduction in an early retirement benefit or retirement-type subsidy permitted under section 411(d)(6)(B).

(c) *Permissible elimination of optional forms of benefit that are redundant*—(1) *General rule.* Except as otherwise provided in paragraph (c)(5) of this section, a plan may be amended to eliminate an optional form of benefit for a participant with respect to benefits accrued before the applicable amendment date if—

(i) The optional form of benefit is redundant with respect to a retained optional form of benefit, within the meaning of paragraph (c)(2) of this section;

(ii) The plan amendment is not applicable with respect to an optional form of benefit with an annuity starting date that is less than 90 days after the date the amendment is adopted; and

(iii) In any case in which the retained optional form of benefit for the participant does not commence on the same annuity starting date as the optional form of benefit that is being eliminated or, as of the applicable amendment date, the actuarial present value of the retained optional form of benefit for the participant is less than the actuarial present value of the optional form of benefit that is being eliminated, the requirements of paragraph (e) of this section are satisfied.

(2) *Similar types of optional forms of benefit are redundant*—(i) *General rule.* An optional form of benefit is redundant with respect to a retained optional form of benefit if—

(A) The retained optional form of benefit is available to the participant;

(B) The retained optional form of benefit is in the same family of optional forms, within the meaning of paragraphs (c)(3) and (4) of this section, as the optional form of benefit being eliminated; and

(C) A participant's rights with respect to the retained optional form of benefit are not subject to materially greater restrictions (such as conditions relating to eligibility, restrictions on a participant's ability to designate the person who is entitled to benefits following the participant's death, or restrictions on a participant's right to receive an in-kind distribution) than applied to the optional form of benefit being eliminated.

(ii) *Special rule for core options.* An optional form of benefit that is a core option may not be eliminated as a redundant benefit under the rules of this paragraph (c) unless the retained optional form of benefit and the eliminated core option are identical except for differences described in paragraph (c)(3)(ii) of this section. Thus, for example, a particular 10-year certain and life annuity may not be eliminated by plan amendment unless the retained optional form of benefit is another 10-year certain and life annuity.

(3) *Family of optional forms of benefit*—(i) *In general.* Paragraph (c)(4) of this section describes certain families of optional forms of benefits. Not every optional form of benefit that is offered under a plan necessarily fits within a family as described in paragraph (c)(4) of this section. Each optional form of benefit that is not included in any particular family listed in paragraph (c)(4) of this section is in a separate family with other optional forms of benefit that would be identical to that optional form of benefit but for differences that are described in paragraph (c)(3)(ii) of this section.

(ii) *Certain differences among optional forms of benefit*—(A) *Differences in actuarial factors and annuity starting dates.* The determination of whether two optional forms of benefit are within a family of optional forms of benefit is made without regard to the actuarial factors that are used to determine the amount of the distributions under those optional forms of benefit and without regard to annuity starting dates. For example, if a plan has a single-sum distribution option that is calculated using a 5% interest rate and a specific mortality table and another single-sum distribution option that is calculated using the applicable interest rate as defined in section 417(e)(3)(A)(ii)(II) and the applicable mortality table as defined in section 417(e)(3)(A)(ii)(I), both single-sum distribution options are in the same family under the rules of paragraph (c)(3)(i) of this section.

(B) *Differences in Social Security leveling features, refund of employee contributions features, and retroactive annuity starting date features.* Two optional forms of benefit that are identical except with respect to Social Security leveling features, refund of employee contributions features, or retroactive annuity starting date features are treated as members of the same family of optional forms of benefit. But see paragraph (c)(5) of this section for special rules relating to Social Security leveling, refund of employee contributions, and retroactive annuity starting date features in optional forms of benefit.

(4) *List of families.* The following are families of optional forms of benefit for purposes of this paragraph (c):

(i) *Joint and contingent options with continuation percentages of 50% to 100%.* An optional form of benefit is within the 50% or more joint and contingent family if it provides a life annuity to the participant and a survivor annuity to an individual that is at least 50% and no more than 100% of the annuity provided to the participant. An optional form of benefit is within the 50% or more joint and contingent family without regard to whether the form of benefit includes a term certain provision, a pop-up provision (under which payments increase upon the death of the beneficiary or another event that causes the beneficiary not to be entitled to a survivor annuity), or a cash refund feature (under which payment is provided upon the death of the last annuitant in an amount equal to the excess of the present value of the annuity at the annuity starting date over the total of payments before the death of the last annuitant).

(ii) *Joint and contingent options with continuation percentages less than 50%.* An optional form of benefit is within the below 50% joint and contingent family if it provides a life annuity to the participant and a survivor annuity to an individual that is no more than 50% of the annuity provided to the participant. An optional form of benefit is within the below 50% joint and contingent family without regard to whether the form of benefit includes a term certain provision, a pop-up provision (under which payments increase upon the death of the beneficiary or another event that causes the beneficiary not to be entitled to a survivor annuity), or a cash refund feature (under which payment is provided upon the death of the last annuitant in an amount equal to the excess of the present value of the annuity at the annuity starting date over the total of payments before the death of the last annuitant).

(iii) *Term certain and life annuity options with a term of 10 years or less.* An optional form of benefit is within the 10 years or less term certain and life family if it is a life annuity with a guarantee that payments will continue to the participant's designated beneficiary for the remainder of a fixed period that is not in excess of 10 years if the participant dies before the end of the fixed period.

(iv) *Term certain and life annuity options with a term in excess of 10 years.* An optional form of benefit is within the greater than 10 years term certain and life family if it is a life annuity with a guarantee that payments will continue to the participant's designated beneficiary for the remainder of a fixed period that is in excess of 10

years if the participant dies before the end of the fixed period.

(v) *Level installment payment options over a period of 10 years or less.* An optional form of benefit is within the 10 years or less installment family if it provides for substantially level payments to the participant for a fixed period of at least two years with a guarantee that payments will continue to the participant's beneficiary for the remainder of the fixed period not in excess of 10 years if the participant dies before the end of the fixed period.

(vi) *Level installment payment options over a period of more than 10 years.* An optional form of benefit is within the greater than 10 years installment family if it provides for substantially level payments to the participant for a fixed period with a guarantee that payments will continue to the participant's beneficiary for the remainder of a fixed period that is in excess of 10 years if the participant dies before the end of the fixed period.

(5) *Special rules for certain features included in optional forms of benefit.* For purposes of applying this paragraph (c), to the extent an optional form of benefit that is being eliminated includes either a social security leveling feature or a refund of employee contributions feature, the retained optional form of benefit must also include that feature, and to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature or a refund of employee contributions feature, the retained optional form of benefit must not include that feature. For purposes of applying this paragraph (c), to the extent an optional form of benefit that is being eliminated does not include a retroactive annuity starting date feature, the retained optional form of benefit must not include the feature.

(d) *Permissible elimination of noncore optional forms of benefit where core options are offered*—(1) *General rule.* Except as otherwise provided in paragraph (d)(2) of this section, a plan may be amended to eliminate an optional form of benefit for a participant with respect to benefits attributable to service before the applicable amendment date if—

(i) After the amendment, each of the core options described in paragraph (f)(3) of this section is available to the participant with respect to benefits attributable to service before and after the amendment;

(ii) The plan amendment is not applicable with respect to an optional form of benefit with an annuity starting date that is less than four years after the date the amendment is adopted; and

(iii) In any case in which all of the core options are not available commencing on the same annuity starting date as each optional form of benefit that is being eliminated or, as of the applicable amendment date, the actuarial present value of the benefit payable under any of the core options with the same annuity starting date is less than the actuarial present value of benefits payable under the optional form of benefit that is being eliminated, the requirements of paragraph (e) of this section are satisfied.

(2) *Special rules*—(i) *Treatment of certain features included in optional forms of benefit.* For purposes of applying this paragraph (d), to the extent an optional form of benefit that is being eliminated includes either a social security leveling feature or a refund of employee contributions feature, at least one of the core options must also be available with that feature, and, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature or a refund of employee contributions feature, each of the core options must be available without that feature. For purposes of applying this paragraph (d), to the extent an optional form of benefit that is being eliminated does not include a retroactive annuity starting date feature, each of the core options must be available without that feature.

(ii) *Eliminating the most valuable option for a participant with a short life expectancy.* For purposes of applying this paragraph (d), if the most valuable option for a participant with a short life expectancy as described in paragraph (f)(3)(i)(D) of this section is eliminated, then, after the plan amendment, an optional form of benefit that is identical, except for differences described in paragraph (c)(3)(ii) of this section, must be available to the participant. However, such a plan amendment cannot eliminate a refund of employee contributions feature from the most valuable option for a participant with a short life expectancy.

(iii) *Single-sum distributions.* A plan amendment is not treated as satisfying this paragraph (d) if it eliminates an optional form of benefit that includes a single-sum distribution that applies with respect to at least 25% of the participant's accrued benefit as of the date the optional form of benefit is eliminated. But *see* § 1.411(d)–4, Q&A–2(b)(2)(v), relating to involuntary single-sum distributions for benefits with a present value not in excess of the maximum dollar amount in section 411(a)(11).

(e) *Permissible plan amendments under paragraphs (c) and (d) eliminating or reducing section 411(d)(6)(B) protected benefits that are burdensome and of de minimis value*—(1) *In general.* A plan amendment that, pursuant to paragraph (c)(1)(iii) or (d)(1)(iii) of this section, is required to satisfy this paragraph (e) satisfies this paragraph (e) if—

(i) The amendment eliminates section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants as described in paragraph (e)(2) of this section; and

(ii) The amendment does not adversely affect the rights of any participant in a more than *de minimis* manner as described in paragraph (e)(3) of this section.

(2) *Plan amendments eliminating section 411(d)(6)(B) protected benefits that create significant burdens and complexities*—(i) *Facts and circumstances analysis.* The determination of whether a plan amendment eliminates section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants is based on facts and circumstances. In the case of an amendment that eliminates an early retirement benefit, relevant factors include whether the annuity starting dates under the plan considered in the aggregate are burdensome or complex (*e.g.*, the number of categories of early retirement benefits, whether the terms and conditions applicable to the plan's early retirement benefits are difficult to summarize in a manner that is concise and readily understandable to the average plan participant, and whether those different early retirement benefits were added to the plan as a result of plan mergers, acquisitions, or other business transactions), and whether the effect of the plan amendment is to reduce the number of categories of early retirement benefit. Similarly, in the case of a plan amendment eliminating a retirement-type subsidy or changing actuarial factors, relevant factors include whether the actuarial factors used for determining benefit distributions available in otherwise identical forms of benefit under the plan considered in the aggregate are burdensome or complex (*e.g.*, the number of different retirement-type subsidies and other actuarial factors available under the plan, whether the terms and conditions applicable to the plan's retirement-type subsidies are difficult to summarize in a manner that is concise and readily understandable to the average plan participant, and

whether those different retirement-type subsidies and other actuarial factors were added to the plan as a result of plan mergers, acquisitions, or other business transactions), and whether the effect of the plan amendment is to reduce the number of categories of retirement-type subsidies or other actuarial factors.

(ii) *Presumption for certain amendments.* If the annuity starting dates under the plan considered in the aggregate are burdensome or complex, then elimination of any one of the annuity starting dates is presumed to eliminate section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants. However, if the effect of a plan amendment with respect to a set of optional forms of benefit is merely to substitute one set of annuity starting dates for another set of annuity starting dates, without any reduction in the number of different annuity starting dates, then the plan amendment does not satisfy the requirements of paragraph (e) of this section. Similarly, if the actuarial factors used for determining benefit distributions available in otherwise identical forms of benefit under the plan considered in the aggregate are burdensome or complex, then elimination of any one set of actuarial factors is presumed to eliminate section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants. However, if the effect of a plan amendment with respect to a set of optional forms of benefit is merely to substitute one set of actuarial factors for another set of actuarial factors, without any reduction in the number of different actuarial factors, then the plan amendment does not satisfy the requirements of paragraph (e) of this section.

(iii) *Restrictions against creating burdens or complexities.* See paragraph (b)(1)(ii) of this section for general rules applicable to multiple amendments. In accordance with these rules, for example, section 411(d)(6)(B) protected benefits are not considered to create burdens and complexities for a plan and its participants if the plan adds a retirement-type subsidy in order to later eliminate another retirement-type subsidy, even if the elimination of the other subsidy would not adversely affect the rights of any plan participant in a more than *de minimis* manner as provided in paragraph (e)(3) of this section.

(3) *Elimination of early retirement benefits or retirement-type subsidies that are de minimis*—(i) *Rules for retained optional forms of benefit under paragraph (c) of this section.* For purposes of paragraph (c) of this section, the elimination of an optional form of benefit does not adversely affect the rights of any participant in a more than *de minimis* manner if—

(A) The retained optional form of benefit described in paragraph (c) of this section has substantially the same annuity starting date as the optional form of benefit that is being eliminated, as described in paragraph (e)(4) of this section; and

(B) Either the actuarial present value of the benefit payable in the optional form of benefit that is being eliminated does not exceed the actuarial present value of the benefit payable in the retained optional form of benefit by more than a *de minimis* amount, as described in paragraph (e)(5) of this section, or the amendment satisfies the requirements of paragraph (e)(6) of this section relating to a delayed effective date.

(ii) *Rules for core options under paragraph (d) of this section.* For purposes of paragraph (d) of this section, the elimination of an optional form of benefit does not adversely affect the rights of any participant in a more than *de minimis* manner if, with respect to each of the core options—

(A) The core option is available after the amendment with substantially the same annuity starting date as the optional form of benefit that is being eliminated, as described in paragraph (e)(4) of this section; and

(B) Either the actuarial present value of the benefit payable in the optional form of benefit that is being eliminated does not exceed the actuarial present value of the benefit payable under the core option by more than a *de minimis* amount, as described in paragraph (e)(5) of this section, or the amendment satisfies the requirements of paragraph (e)(6) of this section.

(4) *Definition of substantially the same annuity starting dates.* For purposes of applying paragraphs (e)(3)(i)(A) and (ii)(A) of this section, annuity starting dates are considered substantially the same if they are within six months of each other.

(5) *Definition of de minimis difference in actuarial present value.* For purposes of applying paragraphs (e)(3)(i)(B) and (ii)(B) of this section, a difference in actuarial present value between the optional form of benefit being eliminated and the retained optional form of benefit or core option is of no more than a *de minimis* amount if, as of the applicable amendment date, the difference between the actuarial present value of the eliminated optional form of benefit and the actuarial present value of the retained optional form of benefit or core option is not more than the greater of—

(i) 2% of the present value of the retirement-type subsidy under the eliminated optional form of benefit (if any) prior to the amendment; or

(ii) 1% of the participant's compensation for the prior plan year (as defined in section 415(c)(3)).

(6) *Delayed effective date*—(i) *General rule.* For purposes of applying paragraph (e)(3) of this section, an amendment that eliminates an optional form of benefit satisfies the requirements of this paragraph (e)(6) if the elimination of the optional form of benefit is not applicable to any annuity starting date before the end of the expected transition period for that optional form of benefit.

(ii) *Determination of expected transition period.* The expected transition period for an optional form of benefit is the period that begins when the amendment is adopted and ends when it is reasonable to expect, with respect to a section 411(d)(6)(B) protected benefit (*i.e.* not taking into account future service), that the form being eliminated would be subsumed by another optional form of benefit (after taking into account expected future accruals). For this purpose, the expected transition period must be determined in accordance with reasonable actuarial assumptions about the future that are likely to result in the longest period of time until the eliminated optional form of benefit would be subsumed, such as the assumption that the participant's compensation will not increase and that future accruals will not exceed accruals in recent periods. In addition, if the plan is subsequently amended to reduce the rate of future benefit accrual (or otherwise to lengthen the expected transition period) before the end of the previously determined expected transition period, the later plan amendment must provide that the elimination of the optional form of benefit is void (or must provide for the effective date to be further extended to a new expected transition date that satisfies this paragraph (e)(6) taking into account the subsequent amendment).

(iii) *Applicability of the delayed effective date rule limited to employees who continue to accrue benefits through the end of expected transition period.* An amendment eliminating an optional form of benefit under this paragraph (e)(6) must be limited to participants who continue to accrue benefits under the plan through the end of the expected transition period. Thus, for example, the plan amendment may not apply to any participant who has a severance from

employment during the expected transition period.

(iv) *Special rule for section 204(h) notice. See* § 54.4980F–1(b), Q&A–8(c), of this chapter for a special rule relating to this paragraph (e)(6).

(f) *Definitions and use of terms*—(1) *Ancillary benefit.* An *ancillary benefit* means a social security supplement (other than a QSUPP as defined in § 1.401(a)(4)–12), a disability benefit not in excess of a qualified disability benefit described in section 411(a)(9), an ancillary life insurance or health insurance benefit, a death benefit under a defined contribution plan, a preretirement death benefit under a defined benefit plan, a plant shutdown benefit that does not continue past retirement age, or any other similar benefit that does not affect the payment of the accrued benefit. *See* §§ 1.401–1(b)(1)(i), (ii), and (iii) and 1.401(a)(4)–4(e)(2).

(2) *Applicable amendment date.* The term *applicable amendment date* means, with respect to a plan amendment, the later of the effective date of the amendment or the date the amendment is adopted.

(3) *Core options*—(i) *General rule.* The *core options* in a plan are—

(A) A straight life annuity under which the participant is entitled to a level life annuity with no benefit payable after the participant's death;

(B) A joint and contingent annuity under which the participant is entitled to a life annuity with a survivor annuity for the individual designated by the participant (whether or not the participant's spouse) that is 75% of the amount payable during the participant's life;

(C) A 10-year certain and life annuity under which the participant is entitled to a life annuity with a guarantee that payments will continue to any person designated by the participant for the remainder of a fixed period of 10 years if the participant dies before the end of the 10-year period; and

(D) The most valuable option for a participant with a short life expectancy (as defined in paragraph (f)(3)(iv) of this section).

(ii) *Treatment of similar core options with different actuarial factors and annuity starting dates.* Except for core options described in paragraph (f)(3)(i)(D) of this section, whether an option is a core option is determined without regard to the actuarial factors that are used to determine the amount of the distributions under those optional forms and without regard to annuity starting dates. Thus, two core options that are described in paragraph (f)(3)(i)(A), or (B) or (C) of this section are not different core options solely because the core options start on different annuity starting dates.

(iii) *Modification of core options to satisfy other requirements.* An annuity does not fail to be a joint and contingent annuity described in paragraph (f)(3)(i)(B) of this section or a 10-year certain and life annuity described in paragraph (f)(3)(i)(C) of this section as a result of differences to comply with applicable law, such as limitations on death benefits to comply with the incidental benefit requirement of § 1.401–1(b)(1)(i) or on account of the spousal consent rules of section 417.

(iv) *The most valuable option for a participant with a short life expectancy*—(A) *General definition.* Except as provided in paragraph (f)(3)(iv)(B) of this section, *the most valuable option for a participant with a short life expectancy* means the optional form of benefit, for each annuity starting date, that is reasonably expected to result in payments that have the largest actuarial present value in the case of a participant who dies shortly after the annuity starting date, taking into account both payments due to the participant prior to the participant's death and any payments due after the participant's death. For this purpose, a plan is permitted to assume that the spouse of the participant is the same age as the participant. In addition, a plan is permitted to assume that the optional form of benefit that is the most valuable option for a participant with a short life expectancy when the participant is age 70½ also is the most valuable option for a participant with a short life expectancy at all older ages, and that the most valuable option for a participant with a short life expectancy at age 55 is the most valuable option for a participant with a short life expectancy at all younger ages.

(B) *Safe harbor hierarchy*—(*1*) A plan may treat a single-sum distribution option with an actuarial present value that is not less than the actuarial present value of any optional form of benefit eliminated by the plan amendment as the most valuable option for a participant with a short life expectancy for each annuity starting date if it is available at all annuity starting dates, without regard to whether the option was available before the plan amendment.

(*2*) If a plan before the amendment does not offer a single-sum distribution option as described in paragraph (f)(3)(iv)(B)(*1*) of this section, a plan may treat a joint and contingent annuity with a continuation percentage that is at least 75% and that is at least as great as the highest continuation percentage available before the amendment as the most valuable option for a participant with a short life expectancy for each annuity starting date if it is available at all annuity starting dates, without regard to whether the option was available before the plan amendment.

(*3*) If the plan before the amendment offers neither a single-sum distribution option as described in paragraph (f)(3)(iv)(B)(*1*) of this section nor a joint and contingent annuity with a continuation percentage as described in paragraph (f)(3)(iv)(B)(*2*) of this section, a plan may treat a term certain and life annuity with a term certain period no less than 15 years as the most valuable option for a participant with a short life expectancy for each annuity starting date if it is available at all annuity starting dates, without regard to whether the option was available before the plan amendment.

(4) *Definitions of types of section 411(d)(6)(B) protected benefits*—(i) *Early retirement benefit.* An *early retirement benefit* means the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age. Different early retirement benefits result from differences in terms relating to timing.

(ii) *Optional form of benefit.* An *optional form of benefit* means a distribution alternative (including the normal form of benefit) that is available under the plan with respect to benefits described in section 411(d)(6)(A) or a distribution alternative with respect to a retirement-type benefit. Different optional forms of benefit exist if a distribution alternative is not payable on substantially the same terms as another distribution alternative. The relevant terms include all terms affecting the value of the optional form, such as the method of benefit calculation and the actuarial assumptions used to determine the amount distributed. Thus, for example, different optional forms of benefit may result from differences in terms relating to the payment schedule, timing, commencement, medium of distribution (*e.g.*, in cash or in kind), election rights, differences in eligibility requirements, or the portion of the benefit to which the distribution alternative applies. Differences in the normal retirement ages of employees or in the form in which the accrued benefit of employees is payable at normal retirement age under a plan are taken into account in determining whether a distribution alternative constitutes one or more optional forms of benefit.

(iii) *Retirement-type benefit.* A *retirement-type benefit* means the payment of a distribution alternative with respect to an accrued benefit or the payment of any other benefit that continues after retirement that is not an ancillary benefit (including a QSUPP as defined in § 1.401(a)(4)–12).

(iv) *Retirement-type subsidy.* A *retirement-type subsidy* means the excess, if any, of the actuarial present value of a retirement-type benefit, over the actuarial present value of the accrued benefit commencing at normal retirement age or at actual commencement date, if later, with both such actuarial present values determined as of the date the retirement-type benefit commences. Examples of retirement-type subsidies include a subsidized early retirement benefit and a subsidized qualified joint and survivor annuity as described in § 1.415–3(c)(2)(i).

(v) *Subsidized early retirement benefit or early retirement subsidy.* A *subsidized early retirement benefit* or an *early retirement subsidy* means the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age where the actuarial present value of the optional forms of benefit available to the participant under the plan at that annuity starting date exceeds the actuarial present value of the accrued benefit commencing at normal retirement age (with such actuarial present values determined as of the annuity starting date). Thus, an early retirement subsidy is an early retirement benefit that provides a retirement-type subsidy.

(5) *Eliminate; elimination; reduce; reduction.* The terms *eliminate* or *elimination* when used in connection with a section 411(d)(6)(B) protected benefit mean to eliminate or the elimination of an optional form of benefit or an early retirement benefit and to reduce or a reduction in a retirement-type subsidy. The terms *reduce* and *reduction* when used in connection with a retirement-type subsidy mean to reduce or a reduction in the amount of the subsidy. For purposes of this section, an *elimination* includes a *reduction* and a *reduction* includes an *elimination.*

(6) *Retirement.* In general, for purposes of this section, the date of *retirement* refers to the annuity starting date. Thus, the term preretirement refers to the time period before the annuity starting date.

(7) *Other rights and features.* The term *other right or feature* generally means any right or feature applicable to employees under a plan. Different rights or features exist if a right or feature is not available on substantially the same terms as another right or feature. For exceptions to the definition of other right or feature, *see* § 1.401(a)(4)–4(e)(3)(ii).

(8) *Actuarial present value.* For purposes of this section, the term actuarial present value means actuarial present value (within the meaning of § 1.401(a)(4)–12) determined using reasonable actuarial assumptions.

(9) *Refund of employee contributions feature.* A *refund of employee contributions features* means a feature with respect to an optional form of benefit that provides for employee contributions and interest thereon to be paid in a single sum at the annuity starting date with the remainder to be paid in another form beginning on that date.

(10) *Retroactive annuity starting date feature.* A *retroactive annuity starting date* feature means a feature with respect to an optional form of benefit under which the annuity starting date for the distribution occurs prior to the date the participant is furnished the notice described in section 417(a)(3).

(11) *Section 411(d)(6)(B) protected benefit.* The term *section 411(d)(6)(B) protected benefit* means the portion of an early retirement benefit, a retirement-type subsidy, or an optional form of benefit attributable to the service of a participant before the applicable amendment date.

(12) *Social security leveling feature.* A *social security leveling feature* means a feature with respect to an optional form of benefit which is designed to provide an approximately level amount annually when the participant's estimated old age benefits from Social Security are taken into account.

(g) *Examples.* The following examples illustrate the application of paragraphs (b) through (f) of this section:

Example 1. (i) *Facts involving amendments to an early retirement subsidy.* Plan A provides an annual benefit of 2% of career average pay times years of service commencing at normal retirement age (age 65). Plan A is amended on November 1, 2004, effective as of January 1, 2005, to provide for an annual benefit of 1.3% of final pay times years of service, with final pay computed as the average of a participant's highest 3 consecutive years of compensation. Participant M is age 50, he has 16 years of service, his career average pay is $37,500, and the average of his highest 3 consecutive years of compensation is $67,308. Thus, M's accrued benefit as of the effective date of the amendment is increased from $12,000 per year at normal retirement age (2% times $37,500 times 16 years of service) to $14,000 per year at normal retirement age (1.3% times $67,308 times 16 years of service). (These facts are similar to the facts in *Example 1* in paragraph (a)(4) of this section.) Before the amendment, Plan A permitted a former employee to commence distribution of benefits as early as age 55 and, for a participant with at least 15 years of service, actuarially reduced the amount payable in the form of a straight life annuity commencing before normal retirement age by 3% per year from age 60 to age 65 and by 7% per year from age 55 through age 59. Thus, before the amendment, the amount of M's early retirement benefit that would be payable for commencement at age 55 was $6,000 per year ($12,000 per year minus 3% for 5 years and minus 7% for 5 more years). The amendment also alters the actuarial reduction factor so that, for a participant with at least 15 years of service, the amount payable in a straight life annuity commencing before normal retirement age is reduced by 6% per year. As a result, the amount of M's early retirement benefit at age 55 becomes $5,600 per year after the amendment ($14,000 minus 6% for 10 years).

(ii) *Conclusion.* The straight life annuity payable under Plan A at age 55 is an optional form of benefit that is an early retirement subsidy. The plan amendment fails to satisfy the requirements of section 411(d)(6)(B) because the amendment decreases the optional form of benefit payable to Participant M below the level that Participant M was entitled to receive immediately before the effective date of the amendment. If instead Plan A had included a provision under which M's straight life annuity payable at any age could be not be less than what it was immediately before the amendment (so that M's straight life annuity payable at age 55 could not be less than $6,000 per year), then the amendment would not fail to satisfy the requirements of section 411(d)(6)(B) with respect to M's straight life annuity payable at age 55 (although the straight life annuity payable to M at age 55 would not increase until the point in time at which the new formula amount with the new actuarial reduction factors exceeds the amount payable under the minimum provision, approximately 14 months after the amendment becomes effective).

Example 2. (i) *Facts involving contingent-event benefits.* Plan B permits participants who have a severance from employment before normal retirement age to commence distributions at any time after age 55 with the amount payable to be actuarially reduced using reasonable actuarial assumptions regarding interest and mortality, but provides that the annual reduction for any participant who has at least 20 years of service and who has a severance from employment after age 55 is only 3% per year (which is a smaller reduction than would apply under reasonable actuarial reductions). Plan B also provides two plant shutdown benefits to participants who have a severance of employment as a result of a plant shutdown. First, the favorable 3% actuarial reduction will apply for commencement of benefits after age 55 and before age 65 for any participant who has a severance from employment as a result of a plant shutdown

and who has at least 10 years of service. Second, all participants who have at least 20 years of service and who have a severance from employment after age 55 (and before retirement age) as a result of a plant shutdown will receive a supplement. Under the supplement, an additional amount equal to the participant's estimated old-age insurance benefit under the Social Security Act is payable until age 65. The supplement is not a QSUPP, as defined in § 1.401(a)(4)–12, because the plan's terms do not state that the supplement is treated as an early retirement benefit that is protected under section 411(d)(6).

(ii) *Conclusion.* The benefit payable with the 3% annual reduction is a retirement-type benefit. The excess of the actuarial present value of the early retirement benefit using the 3% annual reduction over the actuarial present value of the normal retirement benefit is a retirement-type subsidy and the right to receive payments of the subsidy at age 55 is an early retirement benefit. Thus, the right to receive the retirement-type subsidy for participants with at least 10 years of service at the time of a plant shutdown is an early retirement benefit that provides a retirement-type subsidy and is a section 411(d)(6)(B) protected benefit (even though no plant shutdown has occurred). Therefore, a plan amendment cannot eliminate this benefit with respect to service before the applicable amendment date, even before the occurrence of the plant shutdown. Because the plan provides that the supplement cannot exceed the OASDI benefit (Social Security), the supplement is a social security supplement, which is an ancillary benefit that is not a section 411(d)(6)(B) protected benefit.

Example 3. (i) *Facts involving elimination of optional forms of benefit as redundant.* Plan C is a defined benefit plan under which employees may elect to commence distributions at any time after the later of termination of employment or attainment of age 55. At each potential annuity starting date, Plan C permits employees to select, with spousal consent where required, a straight life annuity or any of a number of actuarially equivalent alternative forms of payment, including a straight life annuity with cost-of-living increases and a joint and contingent annuity with the participant having the right to select any beneficiary and any continuation percentage from 1% to 100%, subject to modification to the extent necessary to satisfy the requirements of the incidental benefit requirement of § 1.401–1(b)(1)(i). The amount of any alternative payment is determined as the actuarial equivalent of the straight life annuity payable at the same age using reasonable actuarial assumptions. On September 2, 2004, Plan C is amended to delete all continuation percentages for joint and contingent options other than 25%, 50%, 75% or 100%, effective with respect to annuity starting dates that are on or after January 1, 2005.

(ii) *Conclusion.* (A) *Categorization of family members under the redundancy rule.* The optional forms of benefit described in paragraph (i) of this *Example 3* are members of four families: a straight life annuity; a straight life annuity with cost-of-living increases; joint and contingent options with continuation percentages of less than 50%; and joint and contingent options with continuation percentages of 50% or more. The amendment does not affect either of the first two families, but affects the two families relating to joint and contingent options.

(B) *Conclusion for elimination of optional forms of benefit as redundant.* The amendment satisfies the requirements of paragraph (c) of this section. First, the eliminated optional forms of benefit are redundant with respect to the retained optional forms of benefit because each eliminated joint and contingent annuity option with a continuation percentage of less than 50% is redundant with respect to the 25% continuation option and each eliminated joint and contingent annuity option with a continuation percent of 50% or higher is redundant with respect to any one of the retained 50%, 75%, or 100% continuation options. In addition, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature, return of employee contribution feature, or retroactive annuity starting date feature, the retained optional form of benefit does not include that feature. Second, the amendment is not effective with respect to annuity starting dates that are less than 90 days from the date of the amendment. Third, the plan amendment does not eliminate any available core options, including the most valuable option for a participant with a short life expectance, treating a joint and contingent annuity with a 100% continuation percentage as this optional form of benefit pursuant to paragraph (f)(3)(iv)(B)(*2*) of this section. Finally, the amendment need not satisfy the requirements of paragraph (e) of this section because the retained optional forms of benefit are available on the same annuity starting dates and have the same actuarial present value as the optional forms of benefit that are being eliminated.

Example 4. (i) *Facts involving elimination of optional forms of benefit as redundant if additional restrictions are imposed.* The facts are the same as *Example 3,* except that the plan amendment also restricts the class of beneficiaries that may be elected under the four retained joint and contingent annuities to the employee's spouse.

(ii) *Conclusion.* The amendment fails to satisfy the requirements of paragraph (c)(2)(i)(C) of this section because the retained joint and contingent annuities have materially greater restrictions on the beneficiary designation than did the eliminated joint and contingent annuities. Thus, the joint and contingent annuities being eliminated are not redundant with respect to the retained joint and contingent annuities. In addition, the amendment fails to satisfy the requirements of the core option rules in paragraph (d) of this section because the amendment fails to be limited to annuity starting dates that are at least 4 years after the date the amendment is adopted, the amendment fails to include the core option in paragraph (f)(3)(i)(B) of this section because the participant does not have the right to designate any beneficiary, and the amendment fails to include the core option described in paragraph (f)(3)(i)(C) of this section because the plan does not provide a 10-year certain and life annuity.

Example 5. (i) *Facts involving elimination of a social security leveling feature and a period certain annuity as redundant.* Plan D is a defined benefit plan under which participants may elect to commence distributions in the following actuarially equivalent forms, with spousal consent if applicable: a straight life annuity; a 50%, 75%, or 100% joint and contingent annuity; a 5-year, 10-year, or a 15-year period certain and life annuity; and an installment refund annuity (*i.e.*, an optional form of benefit that provides a period certain, the duration of which is based on the participant's age), with the participant having the right to select any beneficiary. In addition, each annuity offered under the plan, if payable to a participant who is less than age 65, is available both with and without a social security leveling feature. The social security leveling feature provides for an assumed commencement of social security benefits at any age selected by the participant between age 62 and 65. Plan D is amended on September 1, 2004, effective as of January 1, 2005, to eliminate the installment refund form of benefit and to restrict the social security leveling feature to an assumed social security commencement age of 65.

(ii) *Conclusion.* The amendment satisfies the requirements of paragraph (c) of this section. First, the installment refund annuity option is redundant with respect to the 15-year certain and life annuity (except for advanced ages where, because of shorter life expectancies, the installment refund annuity option is redundant with respect to the 5-year certain and life annuity and also redundant with respect to the 10-year certain and life annuity). Second, with respect to restricting the social security leveling feature to an assumed social security commencement age of 65, under paragraph (c)(3)(ii) of this section, straight life annuities with social security leveling features that have different social security commencement ages are treated as members of the same family as straight life annuities without social security leveling features. To the extent an optional form of benefit that is being eliminated includes a social security leveling feature, the retained optional form of benefit must also include that feature, but it is permitted to have a different assumed age for commencement of social security benefits. Third, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature, a return of employee contribution feature, or retroactive annuity starting date feature, the retained optional form of benefit must not include that feature. Fourth, the plan amendment does not eliminate any available core options, including the most valuable option for a participant with a short life expectance, treating a joint and contingent annuity with a 100% continuation percentage as this optional form of benefit pursuant to paragraph (f)(3)(iv)(B)(*2*) of this section. Fifth, the amendment is not effective with respect to annuity starting dates that are less than 90 days from the date the amendment is adopted. The amendment

need not satisfy the requirements of paragraph (e) of this section because the retained optional forms of benefit are available on the same annuity starting dates and have the same actuarial present value as the optional forms of benefit that are being eliminated.

Example 6. (i) *Facts involving elimination of noncore options.* Employer N sponsors Plan E, a defined benefit plan that permits every participant to elect payment in the following actuarially equivalent optional forms of benefit (Plan E's uniformly available options), with spousal consent if applicable: a straight life annuity, a 50%, 75%, or 100% joint and contingent annuity with no restrictions on designation of beneficiaries, and a 5-, 10-, or 15-year period certain and life annuity. In addition, each can be elected in conjunction with a social security leveling feature, with the participant permitted to select a social security commencement age from age 62 to age 67. None of Plan E's uniformly available options include a single-sum distribution. The plan has been in existence for over 30 years, during which time Employer N has acquired a large number of other businesses, including merging over 20 defined benefit plans of acquired entities into Plan E. Many of the merged plans offered optional forms of benefit that were not among Plan E's uniformly available options, including some plans funded through insurance products, often offering all of the insurance annuities that the insurance carrier offers, and with some of the merged plans offering single-sum distributions. In particular, under the XYZ acquisition, the XYZ acquired plan offered a single-sum distribution option that was frozen at the time of the acquisition. On April 1, 2005, each single-sum distribution option applies to less than 25% of the XYZ acquired participants' accrued benefits. Employer N has generally, but not uniformly, followed the practice of limiting the optional forms of benefit for an acquired unit to an employee's service before the date of the merger, and has uniformly followed this practice with respect to each of the early retirement subsidies in the acquired unit's plan. As a result, as of April 1, 2005, Plan E includes a large number of optional forms of benefit which are not members of families identified in paragraph (c)(4) of this section, but there are no participants who are entitled to any early retirement subsidies because any subsidies have been subsumed by the actuarially reduced accrued benefit. Plan E is amended in April of 2005 to eliminate all of the optional forms of benefit that Plan E offers other than Plan E's uniformly available options, except that the amendment does not eliminate any single-sum distribution option except with respect to XYZ acquired participants and permits any commencement date that was permitted under Plan E before the amendment. Plan E also eliminates the single-sum distribution option for XYZ acquired participants. Further, each of Plan E's uniformly available options has an actuarial present value that is not less than the actuarial present value of any optional form of benefit offered before the amendment. The amendment is effective with respect to annuity starting dates that are on or after May 1, 2009.

(ii) *Conclusion.* The amendment satisfies the requirements of paragraph (d) of this section. First, Plan E, as amended, does not eliminate any single-sum distribution option as provided in paragraph (d)(2)(iii) of this section except for single-sum distribution options that apply to less than 25% of a plan participant's accrued benefit as of the date the option is eliminated (May 1, 2009). Second, Plan E, as amended, includes each of the core options as defined in paragraph (f)(3) of this section, including offering the most valuable option for a participant with a short life expectancy (treating the 100% joint and contingent annuity as this benefit, under paragraph (f)(3)(iv)(B)(*2*) of this section). The grandfathered single-sum distribution options are not the most valuable option for a participant with a short life expectancy because these distributions are not available with respect to a participant's entire accrued benefit. In addition, as required under paragraph (d)(2) of this section, to the extent an optional form of benefit that is being eliminated includes either a social security leveling feature or a refund of employee contributions feature, at least one of the core options is available with that feature and, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature or a refund of employee contributions feature, each of the core options is available without that feature. Third, the amendment is not effective with respect to annuity starting dates that are less than 4 years after the date the amendment is adopted. Finally, the amendment need not satisfy the requirements of paragraph (e) of this section because the retained optional forms of benefit are available on the same annuity starting date and have the same actuarial present value as the optional forms of benefit that are being eliminated.

Example 7. (i) *Facts involving reductions in actuarial present value.* (A) Plan F is a defined benefit plan providing an accrued benefit of 1% of the average of a participant's highest 3 consecutive years' pay times years of service, payable as a straight life annuity beginning at age 65. Plan F permits employees to elect to commence reduced distributions at any time after the later of termination of employment or attainment of age 55. At each potential annuity starting date, Plan F permits employees to select, with spousal consent, either a straight life annuity, a joint and contingent annuity with the participant having the right to select any beneficiary and a continuation percent of 50%, 66⅔%, 75%, or 100%, or a 10-year certain and life annuity with the participant having the right to select any beneficiary, subject to modification to the extent necessary to satisfy the requirements of the incidental benefit requirement of § 1.401–1(b)(1)(i). The amount of any joint and contingent annuity and the 10-year certain and life annuity is determined as the actuarial equivalent of the straight life annuity payable at the same age using reasonable actuarial assumptions. The plan covers employees at four divisions, one of which, division X, was acquired on January 1, 1999. The plan provides for distributions before normal retirement age to be actuarially reduced, but, if a participant retires after attainment of age 55 and completion of 10 years of service, the applicable early retirement reduction factor is 3% per year for the years between age 65 and 62 and 6% per year for the ages from 62 to 55 for all employees at any division, except for employees who were in division X on January 1, 1999, for whom the early retirement reduction factor for retirement after age 55 and 10 years of service is 5% for each year before age 65. On December 2, 2004, effective January 1, 2005, Plan F is amended to change the early retirement reduction factors for all employees of division X to be the same as for other employees, effective with respect to annuity starting dates that are on or after January 1, 2006, but only with respect to participants who are employees on or after January 1, 2006 and only if Plan F continues accruals at the current rate through January 1, 2006 (or the effective date of the change in reduction factors is delayed to reflect the change in the accrual rate). For purposes of this *Example 7*, it is assumed that an actuarially equivalent early retirement factor would have a reduction shown in column 4 of the following table, which compares the reduction factors for division X before and after the amendment:

Age	Old division X factor	New factor	Actuarially equivalent factor	Column 3 minus column 2
1	2	3	4	5
65	NA	NA	NA	NA
64	95	97	91.1	+2
63	90	94	83.2	+4
62	85	91	76.1	+5
61	80	85	69.8	+5
60	75	79	64.1	+4
59	70	73	59.0	+3

Age	Old division X factor	New factor	Actuarially equivalent factor	Column 3 minus column 2
1	2	3	4	5
58	65	67	54.3	+2
57	60	61	50.1	+1
56	55	55	46.3	0
55	50	49	42.8	−1

(B) On January 1, 2005, the employee with the largest number of years of service is Employee E, who is age 54 and has 20 years of service. For 2004, Employee E's compensation is $80,000 and E's highest 3 consecutive years of pay on January 1, 2005 is $75,000. Employee E's accrued benefit as of the effective date of the amendment is a life annuity of $15,000 per year at normal retirement age (1% times $75,000 times 20 years of service) and E's early retirement benefit commencing at age 55 has a present value of $91,397 as of January 1, 2005. It is assumed for purposes of this example that the longest expected transition period for any active employee does not exceed 5 months (20 years and 5 months, times 1% times 49% exceeds 20 years times 1% times 50%). Finally, it is assumed for purposes of this example that the amendment reduces optional forms of benefit which are burdensome or complex.

(ii) *Conclusion concerning application of section 411(d)(6)(B).* The amendment reducing the early retirement factors has the effect of eliminating the existing optional forms of benefit (where the amount of the benefit is based on preamendment early retirement factors in any case where the new factors result in a smaller amount payable) and adding new optional forms of benefit (where the amount of benefit is based on the different early retirement factors). Accordingly, the elimination must satisfy the requirements of paragraph (c) or (d) of this section if the amount payable at any date is less than would have been payable under the plan before the amendment.

(iii) *Conclusion concerning application of redundancy rules.* The amendment satisfies the requirements of paragraph (c)(1)(i) and (ii) of this section (see paragraphs (iv) through (vi) of this *Example 7* for the requirements of paragraph (c)(1)(iii) of this section). First, with respect to each eliminated optional form of benefit (*i.e.*, with respect to each optional form of benefit with the Old Division X Factor), after the amendment there is a retained optional form of benefit that is in the same family of optional forms of benefit (*i.e.*, the optional form of benefit with the New Factor). Second, the amendment is not effective with respect to annuity starting dates that are less than 90 days from the date the amendment is adopted. Third, to the extent that the plan amendment eliminates the most valuable option for a participant with a short life expectancy, the retained optional form of benefit is identical except for differences in actuarial factors.

(iv) *Conclusion concerning application of the requirements under paragraph (e) of this section.* The plan amendment must satisfy the requirements of paragraph (e) of this section because, as of the applicable amendment date, the actuarial present value of the early retirement subsidy is less than the actuarial present value of the early retirement subsidy being eliminated. The plan amendment satisfies the requirements under paragraph (e)(1)(i) of this section because the amendment eliminates optional forms of benefit that create significant burdens or complexities for the plan and its participants. See below for the *de minimis* requirement under paragraph (e)(1)(ii) of this section.

(v) *Conclusion concerning application of de minimis rules under paragraph (e)(5) of this section.* The amendment does not satisfy the requirements of paragraph (e)(5) of this section because the reduction in the actuarial present value is more than a *de minimis* amount under paragraph (e)(5) of this section. For example, for Employee E, the amount of the joint and contingent annuity payable at age 55 is reduced from $7,500 (50% of $15,000) to $7,350 (49% of $15,000) and the reduction in present value as a result of the amendment is $1,828 ($91,397–$89,569). In this case, the retirement-type subsidy at age 55 is the excess of the present value of the 50% early retirement benefit over the present value of the deferred payment of the accrued benefit, or $13,921 ($97,269–$83,348) and the present value at age 54 of the retirement-type subsidy is $13,081. The reduction in present value is more than the greater of 2% of the present value of the retirement-type subsidy and 1% of E's compensation because the reduction in present value exceeds $800 (the greater of $262, which is 2% of the present value of the retirement-type subsidy for the benefit being eliminated, and $800, which is 1% of E's compensation of $80,000).

(vi) *Conclusion involving application of de minimis rules under paragraph (e)(6) relating to expected transition period.* The amendment satisfies the requirements of paragraph (e)(6) of this section and, thus, satisfies the requirements of paragraph (c) of this section, including the requirement in paragraph (c)(1)(iii) of this section that paragraph (e) of this section be satisfied. First, it is presumed that the amendment reduces optional forms of benefit that are burdensome or complex. Second, the plan amendment is not effective for annuity starting dates before January 1, 2006, and that date is not earlier than the longest expected transition period for any participant in Plan F on the date of the amendment. Third, the amendment does not apply to any participant who has a severance from employment during the transition period. If, however, a later plan amendment reduces accruals under Plan F, the initial amendment will no longer satisfy the requirements of paragraph (e)(6) of this section (and must be voided) unless, as part of the later amendment, the expected transition period is extended to reflect the reduction in accruals under Plan F.

(h) *Effective date.* The rules of this section apply to amendments adopted on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

PART 54—PENSION EXCISE TAXES

Par. 3. The authority citation for part 54 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * * 54.4980F–1 also issued under 26 U.S.C. 4980F. * * *

Par. 4. Section 54.4980F–1(b) is amended by:

1. Revising paragraph (c) of A–8.
2. Revising paragraph (d) of A–8.

The revisions read as follows:

§ 54.4980F–1 Notice requirements for certain pension plan amendments significantly reducing the rate of future benefit accrual.

* * * * *

A–8. * * *

(c) *Application to certain amendments reducing early retirement benefits or retirement-type subsidies.* Section 204(h) notice is not required for an amendment that reduces an early retirement benefit or retirement-type subsidy if the amendment is permitted under the third sentence of section 411(d)(6)(B) of the Internal Revenue Code and regulations thereunder (relating to the elimination or reduction of benefits or subsidies which create significant burdens or complexities for the plan and plan participants unless the amendment adversely affects the rights of any participant in a more than *de minimis* manner). However, in determining whether an amendment provides for a significant reduction for purposes of this section with respect to an amendment that has an effective date on or after these rules are adopted as final regulations and that reduces a retirement-type subsidy as permitted under § 1.411(d)–3(e)(6) of this chapter,

the amendment is treated in the same manner as an amendment that limits the retirement-type subsidy to benefits that accrue before the applicable amendment date (as defined at § 1.411(d)–3(f)(2) of this chapter) with respect to each participant or alternate payee to whom the reduction is reasonably expected to apply.

(d) *Example.* The following examples illustrate the rules in this Q&A–8:

Example 1. (i) *Facts.* Pension Plan A is a defined benefit plan that provides a rate of benefit accrual of 1% of highest-five years' pay multiplied by years of service, payable annually for life commencing at normal retirement age (or at actual retirement age, if later). Plan A is amended on August 1, 2007, effective January 1, 2008, to provide that any participant who separates from service after December 31, 2007, and before January 1, 2013, will have the same number of years of service he or she would have had if his or her service continued to December 31, 2012.

(ii) *Conclusion.* While the amendment will result in a reduction in the annual rate of future benefit accrual from 2009 through 2012 (because under the amendment, benefits based upon an additional five years of service accrue on January 1, 2008, and no additional service is credited after January 1, 2008 until January 1, 2013), the amendment does not result in a reduction that is significant because the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later) under the terms of the plan as amended is not under any conditions less than the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later) to which any participant would have been entitled under the terms of the plan had the amendment not been made.

Example 2. (i) *Facts.* The facts are the same as in *Example 1,* except that the 2008 amendment does not alter the plan provisions relating to a participant's number of years of service, but instead amends the plan's provisions relating to early retirement benefits. Before the amendment, the plan provides for distributions before normal retirement age to be actuarially reduced, but, if a participant retires after attainment of age 55 and completion of 10 years of service, the applicable early retirement reduction factor is 3% per year for the years between age 65 and 62 and 6% per year for the ages from 62 to 55. The amendment changes these provisions so that an actuarial reduction applies in all cases, but, in accordance with section 411(d)(6)(B), provides that no participant's early retirement benefit will be less than the amount provided under the plan as in effect on December 31, 2007 with respect to service before January 1, 2008. For participant X, the reduction is significant.

(ii) *Conclusion.* The amendment will result in a reduction in a retirement-type subsidy provided under Plan A (*i.e.*, Plan A's early retirement subsidy). Section 204(h) notice must be provided to participant X and any other participant for whom the reduction is significant and the notice must be provided at least 45 days before January 1, 2008 (or by such other date as may apply under Q&A–9 of this section).

Example 3. (i) *Facts.* The facts are the same as in *Example 2,* except that, for participant X, the change does not go into effect for any annuity starting date before January 1, 2009. Participant X continues employment through January 1, 2009.

(ii) *Conclusion.* The conclusion is the same as in *Example 2.* Taking into account the rule in the second sentence of Q&A–8(c) of this section, the reduction that occurs for participant X on January 1, 2009, is treated as the same reduction that occurs under *Example 2.* Accordingly, section 204(h) notice must be provided to participant X at least 45 days before January 1, 2008 (or by such other date as may apply under Q&A–9 of this section).

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

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